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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 765

GEORGE G. EDDY,
Petitioner

vs.

THE STATE OF MICHIGAN
Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Respondent respectfully shows:

Petitioner seeks to review a decision of the Supreme Court of the State of Michigan affirming judgment of conviction for the illegal sale of unregistered securities in a cause entitled *People of the State of Michigan vs. George G. Eddy, Defendant.* The proper respondent is the state, not the court.

JURISDICTION

The issue on search and seizure posed here was not properly raised in the trial court. A motion to suppress evidence based upon claimed unreasonable search must be made before trial; it will not be considered if raised for

the first time while trial is in progress.[1] The motion was not made in the trial court until the close of the prosecution case in main;[2] it was an oral request to strike "all of the testimony of all of the witnesses who bought" securities. It was denied by the trial judge who observed that:

1. There was testimony that the search and scrutiny of the records were accomplished with defendant's permission; (p. 163 Michigan Record)

2. Neither the records nor their substance had been offered in evidence; (p. 172 Michigan Record)

3. There was no evidence whatever that the name of any specific investor who later became a prosecution witness had been learned from the examination of the records. (p. 172 Michigan Record)

QUESTION PRESENTED

The question stated in the petition must be viewed in the context of the disputed issue of fact on permission to search, and of the lack of proof to identify a single investor whose name had been learned from examination of the records.

CONSTITUTIONAL PROVISIONS INVOLVED

Clearly the fifth and fourteenth amendments do not apply. They relate to due process, not to search and seizure.

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[1]

People vs. Marxhausen, 204 Mich. 559, 573 (3 ALR 1505, 1511).

[2]

The motion for new trial likewise was silent on this topic. Pp. 309, 310, Printed Record in Mich. Supreme Court. Also called Michigan Record.

The fourth amendment, proscribing unreasonable searches, has been held to be inapplicable to the states.[3]

RE: PETITIONER'S STATEMENT OF FACTS

The respondent disputes petitioner's version of the facts as it appears in the second and concluding paragraphs on p. 4 of the petition.

The Michigan Record discloses that when petitioner was arrested by Detroit detectives acting at the behest of representatives of the Michigan Corporation and Securities Commission, and questioned as to the whereabouts of the books of the Huron-Eddy Company, a Michigan corporation of which he was an officer, he responded that they were in his auto-trailer at Bay City (110 miles away), which he used as a combination office and home. He described the vehicle's exact location, selected its door key from a group on his key ring, and gave the officers permission to examine the records they sought.[4] As to the mandamus proceedings in the Wayne Circuit Court to compel surrender of the records taken, their return was not ordered. On the contrary, the proceedings abated without determination, after the records had been voluntarily returned.[5]

Irrespective of the existence of permission to search, the record is barren of the name of a single witness pur-

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[3]
Feldman vs. U.S., 322 U.S. 487, 492, citing Burdeau vs. McDowell, 256 U.S. 465.

[4]
P. 154, Michigan Record.

[5]
P. 7, Appellee's Brief in Michigan Supreme Court.

portedly obtained from a scrutiny of the records which the petitioner now claims were unlawfully seized.[6]

REASONS FOR DENYING THE WRIT

I.

In the Michigan opinion is found the following significant and controlling language:

> "• • • The record does not disclose, and apparently defendant did not attempt to show, which of the witnesses were so discovered by the officers to be such purchasers, but only that some, unnamed, were; and it was affirmatively shown that at least some of them were previously known to be such by the officers."

Some forty investors testified for the prosecution according to a tabulation found in the appellant's brief below.[7] Detective Ewing, on cross-examination testified that the names of "some" of the persons who were called as prosecution witnesses were discovered from the records. Nevertheless, defense counsel did not pursue this line of inquiry; he made no effort to discover which, or how many names had been learned from scrutiny of the books, or the specific records wherein the information may have reposed. Having thus abandoned the pursuit in the trial court, he is not free to resurrect the claim here.

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[6]

P. 12, Petition for Certiorari, Lines 8-11. See also quoted language in first paragraph under next heading—"REASONS FOR DENYING THE WRIT".

[7]

Pp. 13, 14, Appellant's Brief.

II.

Representations at the foot of p. 5 and atop p. 6 to the effect that the Michigan Supreme Court erroneously implied that a good case existed without the challenged evidence is an attempt to substitute counsel's views for the court's published opinion. The attack continues:

> "The officers had names of only three prosecution witnesses—Clark, Bushaw and Pacernick—before the search and seizure. None of these witnesses knew the subscribers, under their own testimony. The testimony of these three men could not make out a case."

The Michigan Supreme Court held otherwise, and that tribunal's assessment of the evidence on the point must control. In passing, we are constrained to comment that the record does not support the assertion that the officers had the names of only three prosecution witnesses before the search. Witness Clark, an examiner for the Michigan Corporation and Securities Commission, had received several complaints against the petitioner involving the sale of unregistered securities, had talked to the petitioner concerning them, and had seen several investors.[8]

The Michigan Supreme Court's opinion speaks forcefully on this fact:

> "If any of the evidence which defendant moved to have stricken were to be considered incompetent for the reasons advanced, the motion was yet properly

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[8] Testimony of Hugh Clark, Pp. 268-272, Printed Record.

denied because it covered some testimony which manifestly did not suffer from the claimed infirmity."[9]

III.

Petitioner failed to present a motion to suppress the evidence prior to trial, as required by state practice.

IV.

Petitioner did not urge the claim of unreasonable search in his motion for new trial.

V.

No evidence from the scrutinized records was offered in the prosecution's case.

VI.

Petitioner complains that his records were unreasonably taken, yet the prosecution produced testimony that the search was undertaken with petitioner's permission. The issue was therefore one of fact, which was resolved in the state court.

VII.

The fourth amendment is not applicable to the states, and therefore the petition discloses no substantial federal question.

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[9]
Petition for Certiorari, P. 12, Lines 13-18.

CONCLUSION

It is therefore urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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